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No. 84-718

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT L. MENDENHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly refused to overturn the agency's prior finding that, as of July 23, 1955, petitioner's sand and gravel mining claims were not supported by the "discovery" of a valuable mineral deposit as required by the Mining Law of 1872, 30 U.S.C. 22.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 101-104) is reported at 735 F.2d 1373 (Table). The opinion of the district court (Pet. App. 32-58) is reported at 556 F. Supp. 444. The decision of the Interior Board of Land Appeals (Pet. App. 26-31) is reported at 9 IBLA 278.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1984. A petition for rehearing was denied on June 28, 1984 (Pet. App. 105-106). Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to November 5, 1984 (Pet. App. 1-2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Frank R. Sullivan filed two placer claims on federal lands in Clark County, Nevada, under the authority of the Mining Law of 1872, 30 U.S.C. 22. These claims, known as the "Charleston 24/39" claims, cover deposits of sand and gravel located approximately 12 miles northwest of Las Vegas (Pet. App. 27). Petitioner purchased the claims from Sullivan in 1979.

1. In 1965, while Sullivan still owned the claims, the United States instituted proceedings before the Department of the Interior contesting the validity of the claims. Specifically, the United States contended that the claims did not comprise a "discovery" of valuable minerals because the sand and gravel could not have been marketed profitably on or before July 23, 1955, the effective date of the Common Varieties Act, 30 U.S.C. 611, which removed all common varieties of sand and gravel from future location under the general mining law. After an administrative hearing, the Hearing Officer determined that Sullivan's claims did not contain valuable minerals and therefore were null and void (Pet. App. 3-25). The Hearing Officer specifically found that Sullivan had failed to establish that any sand and gravel actually had been marketed prior to July 23, 1955, or that, under known marketing conditions, there was an outlet for the profitable disposal of substantial quantities of sand and gravel from the two claims on or before July 23, 1955 (*id.* at 21-24). Sullivan had stipulated that the sand and gravel on the claims were "common varieties" within the meaning of the Common Varieties Act, and the Hearing Officer found this to be the case (*id.* at 4-5).

Sullivan appealed to the Interior Board of Land Appeals (IBLA). In that appeal, however, Sullivan did not challenge the Hearing Officer's findings of fact or conclusions of law regarding marketability (see Pet. App. 27). Rather, Sullivan contended only that the Hearing

Officer's decision should be set aside on due process grounds because Sullivan had been represented at the hearing by a non-lawyer. The IBLA rejected this contention and affirmed the decision (*id.* at 26-31), explaining (*id.* at 30) that Sullivan himself deliberately had chosen to forego the right to be represented by legal counsel.

The IBLA entered its decision on February 6, 1973 (Pet. App. 26). At no time thereafter did Sullivan seek judicial review of the IBLA's decision. On February 26, 1973, the United States Bureau of Land Management duly recorded a notice in the official records of the Clark County, Nevada, Recorder that the two mining claims had been adjudicated null and void (*id.* at 45).

2. More than six years later, on March 7, 1979, petitioner purchased the two claims from Sullivan (Pet. App. 45). After he discovered the adverse IBLA decision in the county records, petitioner brought this suit in the United States District Court for the District of Nevada to have the IBLA decision set aside. Basically, petitioner sought to adjudicate the validity of the two mining claims de novo in the district court. The district court, however, limited its review to two questions: (1) whether the Hearing Officer's decision applied the correct legal standards and was supported by substantial evidence (see *id.* at 47); and (2) whether the IBLA had abused its discretion in refusing to reopen and remand the case for a new hearing (see *id.* at 51).

The district court granted the government's motion to dismiss (Pet. App. 32-58). On the first question, the district court held that the Hearing Officer had applied the correct law in considering whether a "valuable" mineral existed and also held that substantial evidence supported the Hearing Officer's determination that no valuable minerals were discovered on Sullivan's two claims on or before the critical date of July 23, 1955 (Pet. App. 55-57). The district court specifically noted

(*id.* at 38-40) the testimony of the government's expert witness that no significant excavations of sand and gravel had occurred on the two claims prior to July 23, 1955, and that any market demand for those minerals could have been readily satisfied from then-existing sand and gravel operations.

On the second question, the district court allowed petitioner to submit exhibits purporting to demonstrate that the IBLA had abused its discretion in refusing to reopen the case. After reviewing the additional evidence, however, the court found that the additional evidence confirmed the Hearing Officer's conclusion that local demand for sand and gravel prior to 1955 was accommodated by existing sources of supply, leaving the sand and gravel on petitioner's mining claims unmarketable. Pet. App. 50-51. The district court also rejected petitioner's argument that Sullivan's representation at the administrative hearing by a non-lawyer constituted a due process violation. The district court explained that Sullivan had chosen to be represented by Robert J. McNutt, a civil engineer, and had persisted in his choice even after the agency itself insisted that Sullivan formally ratify, before a notary public, his decision to be represented by a non-lawyer. *Id.* at 34-36.

The court of appeals affirmed (Pet. App. 101-104). The court stated that "[t]he Hearing Officer found that Sullivan failed to show that sand and gravel was marketed or that there was a profitable outlet for sand and gravel as of July 23, 1955." *Id.* at 103-104. The court held that the Hearing Officer had applied the correct legal standard and that his decision was supported by the evidence.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioner raises no issue even arguably warranting review by this Court.

At the outset, we note that petitioner seeks review in this Court to overturn a 1973 IBLA decision to which he was not a party and from which no appeal was ever taken. In addition, the issues raised by petitioner are ones that were never raised before the IBLA at all. In any event, the issues raised by petitioner essentially ask this Court to reweigh the evidence and redetermine questions of fact that were considered and correctly resolved by the appropriate agency.

1. a. There can be no doubt that the court of appeals and the district court correctly held that the IBLA did not abuse its discretion in affirming the Hearing Officer's decision on the Sullivan claims. The only objection made by Sullivan to the IBLA was that his representation by a non-lawyer in the administrative hearing violated his right to procedural due process. This argument plainly was without merit. The Department of the Interior's regulations allowed Sullivan to be represented by counsel (see Pet. App. 29, 44), and, indeed, the Department specifically pointed out to Sullivan that he was not being represented by counsel (see *id.* at 34-36). Once Sullivan knowingly declined to be represented by counsel, he could not later be heard to complain of a due process violation. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970) ("We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires"). Indeed, petitioner himself does not appear to maintain this argument in his petition.

b. There is similarly no merit to petitioner's contention (Pet. 20-36) that the court of appeals should have reconsidered de novo the Hearing Officer's fact-bound conclusion concerning the marketability of the sand and gravel on the Charleston 24/39 claims. In acquiring the Charleston 24/39 claims from Sullivan in 1979, petitioner acquired two claims that had been adjudicated by

the IBLA to be null and void. Petitioner could acquire no greater interest in the claims than his grantor, who had elected not to appeal the IBLA's decision, had to give. He had no right as a bona fide purchaser to challenge anew the IBLA's earlier determination that the claims were invalid.[1] Moreover, both the federal Anti-Assignment Act, 31 U.S.C. 3727, and the six-year statute of limitations in 28 U.S.C. 2401(a) suggest that petitioner cannot be allowed to seek judicial review of the IBLA's decision at this late date.[2] Finally, the contention that the Hearing Officer's decision was not supported by substantial evidence was not raised before the IBLA and thus, under well established principles of review of agency action, should not even be considered by the courts. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

In any event, substantial evidence supports the decision of the Hearing Officer. Petitioner asserts (Pet. 27) that Sullivan's testimony as to pre-1955 sales from the Charleston 24/39 claims was "unrebutted" and suggests that the opinion of the government's expert witness should have been disregarded (Pet. 27-28, 31). But deci-

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[1] As the district court noted (Pet. App. 53-55), petitioner is deemed under Nevada's recording laws to have acquired these claims with notice that they had been adjudicated null and void. See Nev. Rev. Stat. §§ 111.320, 247.190 (1967); *All American Van & Storage* v. *Deluca Realty, Inc.*, 95 Nev. 253, 592 P.2d 951 (1979); *White* v. *Moore*, 84 Nev. 708, 448 P.2d 35, 36 (1968).

[2] See, *e.g.*, *Naartex Consulting Corp.* v. *Watt*, 542 F. Supp. 1196, 1204 (D.D.C. 1982) (Anti-Assignment Act designed "to prevent persons with the means and disposition from buying up claims against the government and thereby proliferating suits against the government"); *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 510-511 (1967) (right of action to review administrative decision accrues, for statute of limitations purposes, at time of final administrative action). In light of its disposition of the case on other grounds, the court of appeals did not address these two issues.

sions by the administrative factfinder based on credibility determinations should not be upset by a reviewing court except when made irrationally. See, *e.g.*, *D.C. Transit System, Inc.* v. *Washington Metropolitan Area Transit Commission*, 466 F.2d 394, 404 (D.C. Cir.), cert. denied, 409 U.S. 1086 (1972). The testimony of the government's witness provided ample basis for the decision of the hearing officer, and that decision should not be disturbed by a reviewing court. Moreover, Sullivan's testimony regarding his pre-1955 sand and gravel sales was not unrebutted. The Hearing Officer concluded (Pet. App. 21) that the testimony of the government's expert witness and an aerial photograph "establish[ed] a *prima facie* case that there was no production or sale of sand or gravel from [the] Charleston 24/39 [claims] * * *." The Hearing Officer further suggested (Pet. App. 23) that the government's prima facie case could readily withstand a response comprised of "infirm or inconsistent recollection rather than adequate records or other reliable means of proof."

Petitioner suggests (Pet. 16-17) that the court of appeals' decision as to his two claims conflicts with the court of appeals' factual determination regarding other Charleston-tract claims in *Charlestone Stone Products Co.* v. *Andrus*, 553 F.2d 1209 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 604 (1978). This is incorrect. Unlike the detailed factual presentation of marketability made by the claimant in *Charlestone Stone Products* (see 553 F.2d at 1211-1213), Sullivan's evidence of marketability as to the Charleston 24/39 claims was quite meager; it consisted largely of his own "very general" descriptions and four unsworn statements (see Pet. App. 11, 13, 16). Indeed, the Hearing Officer in the *Charlestone Stone Products* case specifically observed (Pet. App. 17) that evidence of pre-1955 mining activity on some of the other Charleston claims did *not* extend

to portions of the Charleston 24/39 claims.[3] Thus, there is no inconsistency at all in the different results with respect to the different claims in the Charleston tract.

2. Petitioner also appears to argue (Pet. 25, 27, 29, 32-35) that the court of appeals incorrectly applied a test focusing on the marketability of the sand and gravel as of July 23, 1955, and instead should have examined the claimant's present "good faith." This argument is without foundation. This Court specifically endorsed the "marketability" test in *United States* v. *Coleman*, 390 U.S. 599, 602-604 (1968), stating that "the marketability test is an admirable effort to identify with greater precision *and objectivity* the factors relevant to a determination that a mineral deposit is 'valuable'" (*id.* at 602 (emphasis added)). By the same token, it is well established that petitioner's focus on his own investments in the mining sites after 1955 is quite irrelevant in light of the statutory cut-off in the Common Varieties Act. As the court of appeals stated in *Rawls* v. *United States*, 566 F.2d 1373, 1376 (9th Cir. 1978), "[b]ecause a claimant must have made a valuable discovery prior to the critical date, events thereafter are not pertinent to the inquiry." To the extent petitioner objects on policy grounds to the leasing scheme that now controls post-1955 discoveries of sand and

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[3] The Hearing Officer stated (Pet. App. 17):

> "There was no active operation on any of the remaining claims on July 23, 1955, [the reference is to all claims involved other than Charleston Nos. 9 and 10, and includes the overlapping 11 and 13A portions of Charleston 24/39] and the occasional utilization of material from these claims prior to and after that date was not connected with the Brawner operation. Also there was no probative evidence that the deposit on any of these latter claims could have been operated profitably in competition with the many other potential deposits in the Las Vegas Valley on the critical date. . . ."

gravel (see Pet. 32-35), those objections should be addressed to Congress, not to this Court.

3. Petitioner asserts (Pet. 37-48) that his property has been taken unlawfully, in violation of the Due Process Clause, apparently on the theory that the courts should have considered his factual claim of marketability on a de novo basis. This assertion, raised for the first time here, is difficult to understand. The contention that the Charleston 24/39 claims were valid was given a full hearing by the agency (with opportunity for judicial review) in the *Sullivan* case. The claims were adjudicated null and void, and petitioner purchased them with notice of their status. He has no property right in them to which he can now attach a constitutional claim. As this Court stated in *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 337 (1963) (quoting *Cameron* v. *United States*, 252 U.S. 450, 460 (1920)), "'no right arises from an invalid claim of any kind.'"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985